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on behalf of other members of the general  
9 public similarly situated

10 UNITED STATES DISTRICT COURT  
11  
12 NORTHERN DISTRICT OF CALIFORNIA

13  
14 CLAIRE DELACRUZ, individually, and  
on behalf of other members of the general  
15 public similarly situated,

16 Plaintiff,

17 vs.

18 CYTOSPORT, INC., a California  
19 Corporation,

20 Defendant.  
21  
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Case Number: 4:11-cv-03532-CW  
**CLASS ACTION**

**PLAINTIFF'S RESPONSE TO  
OBJECTOR THEODORE  
FRANK'S MOTION FOR  
ADMINISTRATIVE RELIEF**

## I. INTRODUCTION

Under Northern District of California Civil Local Rule 7-11(b), Plaintiff Claire Delacruz (“Plaintiff”) submits this response to the Motion for Administrative Relief for Leave to File Declaration of Theodore H. Frank (Dkt. 84) (the “Administrative Motion”), which was filed by Objector Theodore H. Frank (“Frank”).

As a threshold matter, the Court should be aware that prior to Frank’s filing of the Administrative Motion, Plaintiff’s counsel informed Frank that Plaintiff would stipulate to an Order permitting Frank to file his proffered declaration (Dkt. 84-1), so long as Frank would agree that Plaintiff could file a sur-reply in response. Frank rejected Plaintiff’s proposal, however, and instead, stated, by email, as follows:

I don’t agree to a sur-surreply that I haven’t seen. If you would prefer I’d consent to you withdrawing your brief and filing a corrected one that complies with Rule 11 and relevant ethical rules. But I have no intent of agreeing to another cycle of ad hominem and misquotations.

The essence of the Administrative Motion is that in Plaintiff’s Response to Objections to Final Approval of Class Action Settlement (Dkt. 82) (“Plaintiff’s Response”), Plaintiff purportedly made “disparaging and false accusations” (*see* Dkt. 84 at 1:24) about Frank, and, as such, Frank should be permitted to have the last word. To that end, Frank claims that “good cause” exists to supplement the record with his declaration because Plaintiff’s Response is tantamount to the submission of “new evidence” in support of a reply brief. (*Id.* at 2:7-20.)

Contrary to Frank’s assertions, there is nothing “new” about the arguments in Plaintiff’s Response. As Frank is well aware, in his Objection to Proposed Settlement and Fee Request and Notice of Appearance (Dkt. 79) (the “Objection”), Frank sought to “preemptively” address his purported “good faith” motives in pursuing his objection. (*See id.* at 3:6-10.) Specifically, in that regard, without any factual support, Frank accused Plaintiff’s counsel of filing “an abusive class action” and resorting to “*ad hominem* attacks rather than addressing the merits of the underlying arguments.” (*See id.* at 3:5-9.) Frank then devoted several pages of the Objection to argue to the Court that he is not a

1 “professional objector,” all of which was based on his own definition of that term (*Id.* at  
2 3:25-5:22.)

3 In Plaintiff’s Response, Plaintiff noted, among other things, Frank’s notorious  
4 reputation as a serial or professional objector, Frank’s having filed numerous class action  
5 objections around the country, and Plaintiff cited to the other district courts’ dealings with  
6 Frank in *Dennis v. Kellogg Co.*, Case No. 09-CV-1786 (S.D. Cal. Nov. 14, 2013) and  
7 *Lonardo v. Travelers Indemnity Co.*, 706 F. Supp. 2d 766 (N.D. Ohio 2010). Plaintiff’s  
8 Responses then devoted the bulk of the discussion to the substance of the Objection.

9 Frank appears to be hyper-sensitive to the notion that he makes a living objecting to  
10 class action settlements. Nevertheless, the issue of Frank’s true motives and reputation  
11 were introduced into these proceedings *by Frank, not Plaintiff*. As a result, Plaintiff had  
12 every right to respond, and did so appropriately. The arguments in Plaintiff’s Response,  
13 however, are not “new evidence” and, in any event, Frank’s declaration (Dkt. 84-1) does  
14 nothing to assist the Court in evaluating the merits of his objection.

## 15 **II. FRANK PLACED HIS REPUTATION AT ISSUE IN HIS OBJECTION AND** 16 **PLAINTIFF RESPONDED ACCORDINGLY**

17 Frank’s Administrative Motion incredibly claims that Plaintiff’s observations about  
18 Frank’s true motives in objecting to class actions is “new evidence,” to which he must  
19 respond. Yet, Frank ignores that he devoted *over half* of his original Objection to  
20 “preemptively” addressing his notorious reputation. Of course, Frank had every right to do  
21 so and Plaintiff had every right to respond.

22 First, Plaintiff did not falsely claim that Frank’s client sought attorneys’ fees in the  
23 *Dennis v. Kellogg Co.* case. In fact, the district court’s order reflects that Frank’s client  
24 did, in fact, make an unsuccessful request for attorneys’ fees on behalf of other objectors,  
25 even though neither Frank nor his client participated in the appeal:

26 Objector Henderson does not object to the fairness of the  
27 settlement amount; rather, *he argues that other objectors should*  
28 *be entitled to attorneys’ fees for their prior success on appeal.*  
*But neither Henderson, nor his counsel, Theodore Frank of the*  
*Center for Class Action Fairness, participated in the appeal.*  
The objectors that in fact prevailed on appeal, class members

Stephanie Berg and Omar Rivero, are no longer participating in this case. They have apparently terminated their association with objector's counsel Darrell Palmer, and neither objects to the present settlement or moves for fees. *Accordingly, the propriety of a fee award on behalf of their efforts on appeal is not properly before the Court.*

\*\* \*

For these reasons and in light of all briefing and oral argument on his behalf, the Court **OVERRULES** all of Henderson's objections and **DENIES** as unwarranted his request for a fee award to objectors' counsel.

*Dennis v. Kellogg Co.*, 2013 U.S. Dist. LEXIS 163118, at \*14-\*15 (S.D. Cal. Nov. 14, 2013) (emphasis added).

Second, Frank takes issue with Plaintiff's characterization of him as a "professional objector." Yet, Frank's declaration confirms that he receives a monthly salary from an organization called the "Center for Class Action Fairness," which has admittedly filed *dozens* of class action objections around the country. (See Dkt. 84-1 at ¶ 6.) And, although Frank has "disclaimed any right to fees in this case," his declaration confirms that his "Center" sought fees totaling \$193,000 in three cases where the Center did *nothing* towards litigating the case to a settlement.

Instead, the Center sought fees solely in connection with its objections. In that regard, Frank touts the \$87,000 fee his Center obtained in *In re Apple Inc. Sec. Litig.*, 2011 WL 1877988 (N.D. Cal. May 17, 2011), but he neglects to inform the Court that the district court in the *Apple Inc. Sec. Litig.* case rejected Frank and his co-counsel's original request for an inflated fee of \$297,916, because it "would result in an excessive hourly rate of more than \$2,800." *Id.* at \*4-6. And, Frank requested a lodestar multiplier of 2.2 in his fee petition in *Lonardo*, which that court also denied. *See, Lonardo*, 706 F. Supp. 2d at 813-14 ("Ultimately, it is not fair to compare Mr. Frank's limited role as counsel for an objector in this case to Class Counsel's central role as the architect of the lawsuit and the Settlement Class."). In sum, there can be no real dispute that Frank and his "Center" are in the *business* of objecting to class action settlements. In Plaintiff's book, that is the definition of a "professional objector."

1 Third, in the Administrative Motion, Frank curiously takes issue with Plaintiff's  
 2 citation to the *Lonardo* case in Plaintiff's Response (*see* Dkt. 82 at 2:24-25). But, while  
 3 the court in *Lonardo* did not refer to Frank as "professional objector," Plaintiff very  
 4 clearly, and appropriately, noted a quotation from that case, which indisputably referred to  
 5 Frank's brief as "long on ideology and short on law." *Lonardo*, 706 F. Supp. 2d at 785.

6 Finally, because Frank's objection attached a copy of Chamberlain's objection,  
 7 Plaintiff's Response referred to them collectively as the "Frank/Chamberlain" objection.  
 8 Plaintiff understands, however, that Frank does not object to Plaintiff's incentive payment,  
 9 and, as a result, Plaintiff regrets any confusion created by the collective reference to the  
 10 "Frank/Chamberlain" objection. Nevertheless, because Chamberlain does object to  
 11 Plaintiff's incentive payment, Plaintiff stands by the substance of her response.

### 12 **III. CONCLUSION**

13 Frank devoted pages of the Objection to "preemptively" address his motivation and  
 14 reputation as a notorious, serial objector. Accordingly, Plaintiff and her counsel had every  
 15 right to respond, and did so appropriately. Plaintiff's response was not tantamount to the  
 16 introduction of "new evidence," and, in any event, Frank's proffered declaration (Dkt.  
 17 84-1) does not assist the Court in evaluating the merits of his objection.

18 Dated: April 29, 2014

BARON & BUDD, P.C.

19  
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